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ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

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No. 45A05-0711-CR-613

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March 31, 2008

NAJAM, Judge

STATEMENT OF THE CASE

Nicholas Allen Gaunt appeals his sentence following his convictions for two counts of Operating a Vehicle with an Alcohol Concentration of at Least Eight Hundredths (.08) Gram of Alcohol Per One Hundred (100) Milliliters of Blood, Class C felonies, pursuant to a plea agreement. Gaunt presents two issues for review, namely:

1. Whether the trial court abused its discretion when it imposed consecutive sentences.
2. Whether the imposition of consecutive sentences is inappropriate under Indiana Appellate Rule 7(B).

We affirm.

FACTS AND PROCEDURAL HISTORY

On November 13, 2004, Gaunt was driving on I-80 in Gary with passengers Kristin Rice and Travis Woerner. Gaunt, who was seventeen years old at the time, lost control of his vehicle and struck an asphalt roller that was parked beside the highway. Rice and Woerner died from blunt force trauma sustained in the accident. Gaunt's blood alcohol level was determined to be .14 grams per 210 liters of blood. The State filed a petition alleging Gaunt to be a delinquent child and later amended that petition. But on October 17, 2005, after a hearing, the court granted the State's request to waive juvenile court jurisdiction.

On October 19, 2005, the State charged Gaunt with two counts of Causing Death when Operating a Motor Vehicle with an Alcohol Concentration of at Least Eight Hundredths (.08) Gram of Alcohol per One Hundred (100) Milliliters of Blood, Class C felonies ("Counts 1 and 2"); one count of Operating a Vehicle with an Alcohol

Concentration of at Least Eight Hundredths (.08) Gram of Alcohol per One Hundred (100) Milliliters of Blood, a Class C misdemeanor (“Count 3”); and one count of Possession of Alcohol by a Minor, a Class C misdemeanor (“Count 4”). Gaunt and the State negotiated for Gaunt to plead guilty to two counts of Operating a Vehicle While Intoxicated Causing Serious Bodily Injury, as Class D felonies. On September 27, 2006, the State filed a motion to withdraw the plea and agreement, citing Gaunt’s recent arrest on charges of theft, resisting law enforcement, public intoxication, minor in possession of alcohol, and false informing. At a hearing, the court found that the motion was improper because no plea agreement was ever submitted.

On April 5, 2007, the State and Gaunt filed in open court a written plea agreement, under which Gaunt agreed to plead guilty to two counts of Causing Serious Bodily Injury When Operating a Motor Vehicle While Intoxicated, as Class D felonies, and a fixed sentence of eighteen months served and eighteen months suspended on each count, to be served consecutively. On April 27, 2007, the State filed its motion to withdraw that plea and agreement because the victim’s families did not agree that justice would be served under that agreement.

On July 27, 2007, the parties filed another plea agreement, under which Gaunt agreed to plead guilty to Counts 1 and 2 and the State agreed to dismiss Counts 3 and 4. The agreement left sentencing to the trial court’s discretion but allowed the victim’s families to address the court with their respective sentencing recommendations.

The court held a sentencing hearing on September 14, 2007, and accepted the plea agreement. The written sentencing order, entered September 17, 2007, provides, in relevant part:

AGGRAVATING CIRCUMSTANCES

1. [Gaunt's] criminal behavior cost the lives of two people. The case, therefore, involves multiple victims. The Court finds the fact that there are multiple victims to be a major aggravating factor.

MITIGATING CIRCUMSTANCES:

1. [Gaunt] has no history of delinquency or criminal convictions.
2. [Gaunt] is likely to respond affirmatively to probation or short [-]term imprisonment.
3. [Gaunt] admitted his guilt by way of a plea agreement, thus, sparing the Court and the taxpayers the time and expense of a trial.
4. [Gaunt] is a product of a dysfunctional home, parents fought often [sic].
5. [Gaunt] was only 17 years of age at the time of the incident. The Court considers this to be a major mitigating factor.

FINDINGS: After presentation of evidence and hearing argument, the Court finds that the aggravating factors equally balance the mitigating factors.

Appellant's App. at 47-48. The court sentenced Gaunt to four years on each count, with one year suspended, to be served consecutively "because the offenses are 'crimes of violence' involving multiple victims." *Id.* at 48. The court suspended one year of the sentence and ordered one year of probation, for an aggregate sentence of eight years with seven years executed. Gaunt now appeals.

DISCUSSION AND DECISION

Gaunt contends that the trial court abused its discretion by imposing consecutive sentences. Specifically, he argues first that consecutive sentencing was improper because the trial court found that the aggravators and mitigators were in equipoise. Gaunt also argues that his aggregate sentence is inappropriate under Indiana Appellate Rule 7(B). We address each contention in turn.

The decision to enhance a presumptive sentence or to impose consecutive sentences for multiple offenses is generally within the trial court's discretion.¹ McCarthy v. State, 749 N.E.2d 528, 539 (Ind. 2001). Our supreme court has addressed the basis for imposing consecutive sentences as follows:

In order to impose consecutive sentences, the trial court must find at least one aggravating circumstance. The same aggravating circumstance may be used to both enhance a sentence and justify consecutive terms. Here, however, because the trial court found the aggravating and mitigating circumstances to be in balance, there is no basis on which to impose consecutive terms.

Marcum v. State, 725 N.E.2d 852, 864 (Ind. 2000).

While in Marcum the supreme court provided no analysis of that rule, this court has interpreted it to mean that a trial court may “consider aggravators and mitigators in determining the sentence for each underlying offense and then to independently consider aggravators and mitigators in determining whether to impose concurrent or consecutive sentences.” Frentz v. State, 875 N.E.2d 453, 472 (Ind. Ct. App. 2007), trans. denied. And both this court and the supreme court have frequently noted that the multiple victims

¹ The law that was in effect at the time of the commission of the crime controls the resolution of sentencing issues. Peace v. State, 736 N.E.2d 1261, 1267 (Ind. Ct. App. 2000), trans. denied. Thus, we analyze the sentencing issues using the presumptive sentencing scheme in effect in 2004.

aggravator is sufficient to support the imposition of consecutive sentences. See Page v. State, 878 N.E.2d 404, 411 (Ind. Ct. App. 2007), trans. denied; Frentz, 875 N.E.2d at 472; Major v. State, 873 N.E.2d 1120, 1131 (Ind. Ct. App. 2007), trans. denied; McCann v. State, 749 N.E.2d 1116, 1120 (Ind. 2001); see also O’Connell v. State, 742 N.E.2d 943, 952 (Ind. 2001).

Here, the trial court found the existence of multiple victims to be the sole aggravator. The court found as mitigators Gaunt’s lack of criminal history, his age, his guilty plea, as well that he was likely to respond to short incarceration or probation and that he was raised in a dysfunctional home. After finding that the aggravator and mitigators balanced, the court imposed the presumptive sentence on each count. The court then ordered the sentences to be served consecutively “because the offenses are ‘crimes of violence’ involving multiple victims.” Appellant’s App. at 48.

When imposing the underlying sentences, the trial court found the aggravator and mitigators to be in equipoise. But in the second step of the two-step process, when the trial court addressed the issue of consecutive sentences, the court did not balance aggravators and mitigators. Instead, the court identified only a single significant aggravator, the existence of multiple victims. Since there were no mitigators to balance in this second step, it cannot be said that the aggravator and mitigators were in equipoise. Thus, Marcum does not preclude consecutive sentences in this case. See Frentz, 875 N.E.2d at 472. The trial court did not abuse its discretion when it imposed consecutive sentences.

Gaunt also contends that the consecutive sentences imposed are inappropriate in light of the nature of the offenses and his character. Indiana Appellate Rule 7(B) provides that this court “may review a sentence authorized by statute if, after due consideration of the trial court’s decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” Although Rule 7(B) does not require us to be “very deferential” to a trial court’s sentencing decision, we still must give due consideration to that decision. Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We also understand and recognize the unique perspective a trial court brings to its sentencing decisions. Id. “Additionally, a defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate.” Id.

Gaunt argues that the consecutive sentence is inappropriate because he had no history of delinquency or criminal convictions, he pleaded guilty to the most serious of the charges, and he was only seventeen years old at the time of the offenses. He also points out that the mother of one of the victims told the sentencing court that the term of incarceration for Gaunt, if any, should be short. But Gaunt was responsible for the deaths of two of his teenage passengers in an automobile accident.² The accident occurred because Gaunt, while a minor, drove with a blood alcohol content of .14 gram per 210 liters of blood and struck a parked asphalt roller. And sometime between the date of the accident and sentencing, Gaunt was arrested and charged with criminal conversion,

² A third passenger survived the accident.

resisting law enforcement, public intoxication, and illegal consumption of alcohol. Gaunt's sentence is not inappropriate in light of his character.

Nor is Gaunt's sentence inappropriate in light of the offenses. As noted above, the charges arose from an accident in which Gaunt, a minor, was driving while intoxicated and struck a parked asphalt roller. There was evidence that the female victim had refused to ride with Gaunt several times but finally relented. She and another passenger died in the accident. We cannot say that Gaunt's sentence is inappropriate in light of the nature of the offenses.

Affirmed.

BAILEY, J., and CRONE, J., concur.